

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN**

DUNCAN MCNEIL,

Plaintiff,

v.

Case No. 06-C-1057

UNITED STATES OF AMERICA,

Defendant.

ORDER AND RECOMMENDATION

Plaintiff Duncan McNeil, III (“McNeil”), currently incarcerated in Spokane, Washington, and proceeding pro se, filed a complaint alleging, among other things, that he was discriminated against on account of a disability. Accompanying his complaint is a motion to proceed in forma pauperis.

Because McNeil is incarcerated and because this is a civil action for the purposes of the Prison Litigation Reform Act (hereinafter “PLRA”), McNeil is required to pay the statutory filing fee of \$350.00 in full. Newlin v. Helman, 123 F.3d 429, 432 (7th Cir. 1997), overruled in part by Lee v. Clinton, 209 F.3d 1020 (7th Cir. 2000) and Walker v. O’Brien, 216 F.3d 626 (7th Cir. 2000); 28 U.S.C. § 1915(b)(1).

Under the PLRA, which amended the in forma pauperis statute, the court must first assess an initial partial filing fee of 20 percent of the average monthly deposits to the plaintiff’s prison account or the average monthly balance in the plaintiff’s prison account for the six-month period immediately preceding the filing of the complaint, whichever is greater.

After the initial fee is paid, the prisoner must make monthly payments of 20 percent of the proceeding month's income until the filing fee is paid in full. 28 U.S.C. § 1915(b)(1). The agency that has custody of the prisoner will collect the money and send payments to the court. In this regard, prison officials must capture 20 percent of the deposits made to the plaintiff's account each month and forward them to the court so long as the account balance exceeds ten dollars.

The plaintiff filed a certified copy of his prisoner trust account statement as required under 28 U.S.C. § 1915(a)(2). A review of this information reveals that, for the period immediately preceding the filing of this complaint, the average monthly deposit to the plaintiff's prison account was \$0.00 and the average monthly balance of the account was \$-1196.95. Thus, in accordance with the provisions of 28 U.S.C. § 1915(b)(1)(B), because the plaintiff lacks any funds the plaintiff is not required to pay an initial partial filing fee.

The court now turns its attention to § 1915(g), which states:

In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

The Seventh Circuit Court of Appeals, on May 1, 2006, denied McNeil's motion to proceed in forma pauperis on appeal in an unrelated case because McNeil had previously incurred three strikes. The court stated:

The appellant has, on three or more prior occasions, brought an action or appeal that was dismissed on the grounds that it is frivolous or fails to state a claim upon which relief may be granted. See McNeil v. United States, No. CV-06-058-AAM, 2000 WL 618107 (E.D. Wash. Mar. 10, 2006) listing cases); McNeil v. United States, No. CV-05-211-AAM, 2005 WL 1915842, at *1-2 (E.D. Wash. Aug. 9, 2005); McNeil v. United States, No. 3-05-CV-1284-B, 2005 WL 1521485 (N.D. Tex. June 28, 2005) (listing cases).

McNeil v. United States, No. 06-1977 (7th Cir. May 1, 2006).

Because McNeil has previously incurred three strikes, he is not entitled to proceed in forma pauperis. Therefore, pursuant to 28 U.S.C. § 1915(g), McNeil's motion to proceed in forma pauperis is denied. If McNeil wishes to proceed with this action, he shall pay the required \$350 filing fee within 14 days. If the filing fee is not paid within 14 days, this court recommends that the district judge randomly assigned to this case dismiss McNeil's complaint.

IT IS THEREFORE ORDERED that McNeil's motion to proceed in forma pauperis is **denied**. In order to proceed, McNeil is required to pay the \$350.00 filing fee within 14 days of this order.

IT IS RECOMMENDED that if McNeil fails to pay the \$350.00 filing fee within 14 days of this order, the district judge randomly assigned to this case dismiss McNeil's complaint.

The clerk of court shall randomly assign this case to a district judge for further processing.

Your attention is directed to 28 U.S.C. § 636(b)(1)(A), (B) and (C) and General Local Rule 72.3 (E.D. Wis.), whereby written objections to any order or recommendation herein or part thereof may be filed within ten days of the date of service of this recommendation and order. Objections are to be filed in accordance with the Eastern District of Wisconsin's electronic case filing procedures. Courtesy paper copies of any objections shall be sent directly to the chambers of the district judge assigned to the case. Failure to file a timely objection with the district court shall result in a waiver of your right to appeal.

Dated at Milwaukee, Wisconsin, this 18th day of October, 2006.

s/AARON E. GOODSTEIN
United States Magistrate Judge